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# In the Supreme Court of the United States

OCTOBER TERM, 1937

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No. 202

HARRY FLEISHER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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No. 203

SAM FLEISHER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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No. 204

JOSEPH STEIN, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 43–45) has not yet been reported.

## JURISDICTION

The judgments of the Circuit Court of Appeals were entered June 3, 1937 (R. 41–42). The petition for writs of certiorari was filed July 8, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

## QUESTION PRESENTED

Whether the four counts of the indictment charged but one offense, so that the trial court erred in imposing a separate punishment upon each count.

## STATEMENT

Petitioners were indicted, with others, in the District Court of the United States for the Eastern District of Michigan on four counts of an indictment charging, in the first count, that from October 1, 1934, to and including the time of the filing of the indictment, the defendants unlawfully conspired together to possess, and cause to be possessed, certain stills and distilling apparatus for the production of distilled spirits, and to cause the same to be set up without having the same registered with the Collector of Internal Revenue, as required by law. The second count charged that between October 1, 1934, and the date of the filing of the indictment, the defendants unlawfully conspired together to

make and ferment, and to cause to be made and fermented, large quantities of mash in a building and on premises not duly authorized and designated according to law as a distillery. The third count charged that between the same dates the defendants unlawfully conspired together to carry on the business of distillers without having given bond, as required by law, and with the intent on their part to defraud the United States of the tax on spirits to be distilled. The fourth count charged that during the same period the defendants unlawfully conspired together to possess a large quantity of distilled spirits, namely, 775 gallons, at 5620 Federal Street, Detroit, Michigan, and 1,500 gallons at 4029 Milford Street, Detroit, Michigan, the immediate containers thereof not having affixed thereto the stamp or stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed on such spirits, all in violation of Title 18, Section 88, and Title 26, Sections 1162, 1185, 1184, and 1152a, United States Code, respectively. Different overt acts were set forth in support of each count (R. 1–8).

At the trial petitioners moved to consolidate the four counts of the indictment into one count, on the ground that the four counts constituted but one conspiracy and one crime. The motion was overruled (R. 32). Petitioners were convicted on all four counts of the indictment (R. 10) and each was sentenced to two years' imprisonment and to pay a

fine of $5,000 on each count, the imprisonment sentences to run consecutively and the fines to be cumulative (R. 10–15). Petitioners took separate appeals to the Circuit Court of Appeals for the Sixth Circuit (R. 16–27), where the convictions and sentences were affirmed (R. 41–45).

ARGUMENT

Petitioners contend that the four counts of the indictment charge but one conspiracy and one offense; that count three, charging a conspiracy to carry on the business of distillers without having given bond, comprises as ingredients and component elements counts one, two, and four, and that to compel petitioners to serve separate and distinct sentences on each count contravenes the Fifth and Eighth Amendments to the Constitution.

1. *In limine,* we deem it our duty to point out to this Court that the first count charges that the object of the conspiracy was a failure to register certain stills with the Collector of Internal Revenue, whereas the charge should have been that the object of the conspiracy was a failure to register the stills with the District Supervisor of the Alcohol Tax Unit, in the Bureau of Internal Revenue, as required by law and regulations. Although this point does not appear to have been raised in the courts below and is not mentioned in the petition for writ of certiorari or in the supporting brief, it is obviously one arising upon the face of the record and may undoubtedly be considered by this Court. Cf. *United States* v. *Atkinson,* 297 U. S. 157, 160,

and cases cited. While Section 3258, Revised Statutes (U. S. C., Title 26, Sec. 1162), required stills to be registered with the Collector of Internal Revenue, the Circuit Courts of Appeals for the Fourth and Tenth Circuits have held, in *Benton* v. *United States,* 80 F. (2d) 162, certiorari denied, 297 U. S. 705, and *Scott* v. *United States,* 78 F. (2d) 791, where the question was raised, that the present statutes, Executive Order, and regulations [1] require that stills be registered with the District Supervisor of the Alcohol Tax Unit and that a charge of failure to register with the Collector of Internal Revenue states no offense. To the same effect are the decisions of the Circuit Courts of Appeals for the Second and Ninth Circuits, in *United States* v. *Lecato,* 29 F. (2d) 694 (C. C. A. 2d); *Silva* v. *United States,* 35 F. (2d) 598 (C. C. A. 9th), certiorari denied, 281 U. S. 751, and *Connley* v. *United States,* 46 F. (2d) 53 (C. C. A. 9th), where indictments charged the failure to register stills with the Collector of Internal Revenue instead of charging failure to register with the District Prohibition Administrator of the Bureau of Internal Revenue as required by law and regulations in effect during the prohibition era.[2] See also *United States* v. *Dibella,* 28 F. (2d) 805 (C. C. A. 2d), certiorari denied, 278 U. S. 658.

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[1] These are set forth in the opinions in the *Benton* and *Scott* cases, *supra.*

[2] During a portion of the prohibition era stills were registrable with the District Supervisor of Permits in the Bureau of Industrial Alcohol, Treasury Department. See *Benton* v. *United States, supra,* p. 163.

We have no reason to question the correctness of these decisions. There is, however, pending before this Court a petition for writs of certiorari in Nos. 258–261, *Frank E. Whitcombe et al.* v. *United States*, in which the contention is made, among others, that there is no statute or other authority empowering the Commissioner of Internal Revenue to provide by regulations or otherwise for the registration of stills with the District Supervisor of the Alcohol Tax Unit instead of with the Collector of Internal Revenue. This question of power was not specifically raised or considered in the cases above cited. For the reasons stated, however, in the Government's brief in opposition in Nos. 258–261, *supra*, we think that the contention made by the petitioners in those cases is without merit.

We believe that, in view of the decisions above referred to, if the question as to the defect in count one had been raised in the courts below, this count would undoubtedly have been dismissed or the convictions thereunder reversed. We, however, do not formally confess error because we feel that where a conviction of a criminal offense has been affirmed by a Circuit Court of Appeals such judgment should not be reversed except by this Court, after examination of the record. Accordingly, if writs of certiorari are denied in the cases of *Whitcombe et al. v. United States, supra,* we submit petitioners' convictions on the first count and the sentences thereon for such disposition as this Court may deem proper.

2. With respect to counts two, three and four, we submit that petitioners' contention that they charged but one crime is without merit and that the convictions thereon should be sustained. Count two charged a conspiracy to ferment mash, in violation of U. S. C., Title 26, Section 1185, which provides that no mash shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law. Count three charged a conspiracy to carry on the business of distillers without having given bond, as required by law, and with intent to defraud the United States of the tax on the spirits distilled, in violation of U. S. C., Title 26, Sec. 1184, which makes it an offense for any person to carry on the business of a distiller without having given bond, as required by law, or to engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him. Count four charged a conspiracy to possess a large quantity of distilled spirits in unstamped containers, in violation of Section 201 of the Liquor Taxing Act of 1934 (U. S. C., Title 26, Sec. 1152a), which provides that no person shall, except as therein provided, possess any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed on such spirits. Different overt acts were charged in support of each count.

In the absence of a bill of exceptions (see R. 44) it must be assumed that the evidence was sufficient to support convictions of separate conspiracies to commit the several statutory offenses charged. While, as pointed out by the court below (R. 44), the acts of unlawfully setting up a still, illegally manufacturing mash, and possessing and trafficking in illicit liquors are often interrelated, Congress has by the internal revenue laws specifically provided that these acts shall constitute different offenses, and this Court, in *Albrecht* v. *United States,* 273 U. S. 1, 11, held that there is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit, and punishing also the completed transaction. A single act may be an offense against two statutes, and if each statute requires proof of some fact which the other does not, an acquittal or conviction under either statute does not exempt the accused from prosecution and punishment under the other. *Blockburger* v. *United States,* 284 U. S. 299, 304; *Gavieres* v. *United States,* 220 U. S. 338, 342. In order for indictments or counts to be identical they must be the same in law and in fact, and if they are perfectly distinct in point of law, however nearly connected in fact, they are still distinct and separate offenses. *Burton* v. *United States,* 202 U. S. 344, 380. In determining the question of identity of offenses, the test approved

by this Court is whether the same evidence is required to sustain them. *Carter* v. *McClaughry*, 183 U. S. 365, 394; *Burton* v. *United States, supra*, p. 381; *Gavieres* v. *United States, supra*, p. 343; *Ebeling* v. *Morgan*, 237 U. S. 625, 631.

Applying this test to the counts in the instant case, the object of each conspiracy is one of the elements of the offense which must be alleged and proved. Obviously, the charge of conspiracy to manufacture mash could be proved without evidence, for instance, of whether a still had been set up and registered or not, whether the defendants were also carrying on the business of distillers without giving bond, or whether they possessed distilled spirits in unstamped containers. So, too, the charge of conspiracy to carry on the business of distillers without giving bond was not dependent for its proof on whether mash had been manufactured or liquor possessed in unstamped containers. Likewise, the charge of conspiracy to possess liquor in unstamped containers could be completely proved by evidence which made no reference whatever to the wholly unrelated and distinct transactions in the other counts. Each charge of conspiracy required an element of proof which was not necessary to the proof of the others. It is not uncommon for large illicit liquor operators to have independent organizations for supplying the raw materials, manufacturing the liquor, and selling and distributing the finished product. A conspir-

acy to do any one of these things with intent to defraud the revenue could be established without proof of any of the other transactions. Each transaction could be complete in itself. The evidence required to prove any one of the conspiracies charged in the instant indictment would not necessarily prove the existence of any of the others. Each conspiracy was a separate and distinct offense in no way connected as a component part of any of the acts designated as the object of the other conspiracies, and each conspiracy required proof of a separate and distinct fact not necessary in the proof of any of the others. The following language of the Circuit Court of Appeals for the Eighth Circuit in *Beddow* v. *United States,* 70 F. (2d) 674, 676, in which an indictment charged several conspiracies growing out of the same transaction and the convictions thereon were upheld, is applicable here:

> The contention that the conspiracy to forge (count 1) and the conspiracy to utter (count 4) constituted but one crime is also without merit. The accepted test of whether two charges are for the same crime is whether the evidence necessary to establish one of them establishes the other.
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> * * * * *
>
> The evidence necessary to establish one of these offenses does not establish the other. For instance, the charge of conspiracy to forge the indorsement under count 1 would be complete if the transaction stopped there

> and no utterance were attempted; so that evidence which would completely establish the offense under count 1 would not establish the commission of the crime under count 4. On the other hand, the conspiracy to utter, charged in count 4, might be completely proven without reference to any conspiracy to forge the indorsements; all the necessary proof being that the indorsement was forged and there was a conspiracy to utter the forged instrument. Since the proof of either of these charges does not establish the other, they are properly charged as separate offenses separately defined in this statute.

In *Burton* v. *United States, supra,* where it was held that agreeing to receive and the receiving of certain forbidden compensation were separate offenses, this Court said (pp. 377–378):

> But Congress intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied. Therefore an agreement to receive compensation was made an offense. So the receiving of compensation in violation of the statute, whether pursuant to a previous agreement or not, was made another and separate offense. There is, in our judgment, no escape from this interpretation consistently with the established rule that the intention of the legislature must govern in the interpretation of a statute. "It is the

> legislature, not the court, which is to define a crime, and ordain its punishment."

In *Blockburger* v. *United States, supra,* it was held that the single sale of a certain drug not in or from the original stamped package, and not in pursuance of a written order of the purchaser, as required by the Harrison Narcotic Act, constituted separate offenses. In *Albrecht* v. *United States, supra,* it was held that possessing and selling the same liquor were distinct offenses. In *Morgan* v. *Devine,* 237 U. S. 632, it was held that by breaking into a post office and stealing property therein two separate offenses were committed: This Court said (p. 639):

> Notwithstanding there is a difference in the adjudicated cases upon this subject, we think the better doctrine recognizes that, although the transaction may be in a sense continuous, the offenses are separate, and each complete in itself.

A number of decisions to the same effect in the courts below are cited in the opinion of the Circuit Court of Appeals in the instant case (R. 45). While petitioners cite some cases as showing a contrary view, they present no such conflict as to require the issuance of writs of certiorari on this point. If not distinguishable on the facts and the statutes involved, they have not been followed by the great majority of decisions or by later decisions of this Court.

3. While for the foregoing reasons we think the convictions on counts two, three, and four were proper, there arises the question whether the sentences of imprisonment on count two should stand, if this Court decides that the convictions and sentences on count one should be reversed. Each sentence of imprisonment on count two provides that it shall take effect "from and after expiration of term of imprisonment imposed on Count One." (R. 11, 13, 15.) If count one and the sentences thereon are eliminated, there will be no term of imprisonment on count one to expire and it will leave the date of the commencement of the sentences on count two indefinite. This is also true of the sentences of imprisonment on the remaining counts, as each is to begin to run upon the expiration of the sentence of imprisonment on the preceding count. It would seem, therefore, that the sentences of imprisonment on count two should be amended so as to make their date of commencement definite.

## CONCLUSION

While we are of the opinion that the convictions on counts two, three, and four should be upheld, the cases are submitted, if the writs of certiorari are denied in the cases of *Whitcomb et al.* v. *United States, supra,* for such disposition as to the convictions and sentences on count one and the amendment of the sentences of imprisonment on

the remaining counts as this Court may deem proper.

Respectfully submitted.

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